IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1704 OF 2003
IN
SUIT NO.3349 OF 1989

Sunil C.Thadhani ..Plaintiff

Vs.

Haresh C.Thadhani and Anr. ..Defendants

And

Indian Overseas Bank ..Applicants

Mr.Tushar Bhavsar a/w Mr.Ranjit Raut i/b M/s.Ranjit and Co. for the plaintiff

Mr.Simil Purohit a/w Ms.Neena Kapadia i/b Pandya Gandy and Co. for the applicant

Mr.Pankaj Kawli i/b M.K.Ambalal and Co. for the defendant no.1

Ms.R.C.Nichani for defendant no.2

Mr.D.R.Patil, representative of Court Receiver present

CORAM : S.U.KAMDAR, J
DATED : 10TH JANUARY, 2006

P.C.:

1. The present application is taken out by the applicant bank for a direction that leave be granted to the Receiver appointed by the Hon'ble Debt Recovery Tribunal-III, Bombay, to take

possession of the suit properties from the Court Receiver, High Court, Bombay who is appointed as Receiver in the present suit and further order is sought that Court Receiver should be directed to comply with the direction given by D.R.T. in the order dt. 5.3.03. Some of the material facts of the present case are as under:

2. Some time in or about 1989 suit was filed for dissolution of accounts of partnership firm M/s.Evergreen Trades and Agencies. To the said suit, there were three parties, namely Chetan B.Thadani, Sunil C. Thadani and Haresh C. Thadani who were the partners of the said firm. The said Chetan B.Thadani expired on 19.5.93 leaving behind him three legal heirs namely Haresh C.Thadani (son), Sunil C.Thadani (son) and Mrs.Komal Suresh Chainani (married daughter). On 29.1.90 an application was moved for appointment of Court Receiver, High Court, Bombay in respect of the assets of the said partnership firm and Court Receiver was appointed as Receiver.

3. In the meantime, bank also filed a suit

being suit no.1424 of 1989 in this court for order and decree against partnership firm and its partners being borrower and guarantors in respect of bank loan of sum of Rs.19,36,377.01. The total claim of the bank in the suit was Rs.20,42,234.53. On 10.4.91 bank moved an application for appointment of Court Receiver. Court Receiver was appointed in bank suit. However, Court Receiver was directed not to take possession of the property in the light of the fact that Receiver was already in possession of the property as being appointed as Receiver in the present partnership suit by an order dt.29.1.90. It was further directed in the said order dt. 10.4.91 that Court Receiver not to take possession for a period of three months from that date. After Court Receiver takes possession Court Receiver to put up a report regarding sale of movables and the interim order was granted not to dispose off property till the hearing of the motion.

4. In the meantime, the father who was one of the plaintiff in the partnership suit expired. On 19.5.93 father left behind two sons who were

plaintiff no.2 and defendant no.1 to the said suit and the married daughter as his legal heirs. In view of the fact that the said married daughter was also claiming right, title and interest in the partnership business through the share of the deceased father, she was impleaded as defendant no.2 in the present suit.

5. After the daughter was brought on record as 2nd defendant to the suit, two of the parties i.e. two brothers namely plaintiff and defendant no.1 filed minutes of order in this court and obtained certain directions. The said Minutes of order records that dispute between the parties i.e. plaintiff and defendant no.1 have been finally settled. Minutes of order further provides that details of the accounts of the partnership firm are settled. Under clause 3 of the said Minutes of the Order the shares of both the sons namely plaintiff and defendant no.1 has been accepted as 40% each and both the sons have divided properties including the factory premises and flat no.5 and 6 situated at Bandra in the aforesaid proportion. Under clause 6 of the said Consent Terms, Court Receiver

was directed to hand over possession of all movables including furniture, articles, etc. lying in the said premises to both the plaintiff and defendant no.1 who have agreed to share and use the said furniture in equal share. However, inspite of the fact that suit has been settled between the plaintiff and defendant no.1 finally but suit was continued under the said Minutes of Order and the Court Receiver is also continued of the suit property but only on paper without any property being held by him. With the result the order dt.29.1.90 stood modified and the liability to make payment of any royalty amount in the said partnership account ceased to exist. By the time the said order was obtained on 17.10.01 amount which was received by the Court Receiver towards the Royalty was deposited with the Court Receiver. However, even the said royalty amount received by the Court Receiver is also distributed by the plaintiff and defendant no.1.

6. From the aforesaid conduct of the plaintiff and defendant no.1 it indicates that the order by consent minutes was obtained fraudulently and only

with an intention that bank cannot take effective steps to take possession of the property and for recovery of their dues. Admittedly, no amount was has been received by applicant bank from the said partnership firm or plaintiff and defendant no.1 either from royalty amount or from the mortgaged properties. In February 2002 the bank suit was transferred to the Debt Recovery Tribunal, Bombay as the Recovery of Debts due to Banks and Financial Institutions Act, 1993 came into force. Even thereafter when bank applied to the DRT for appointment of Court Receiver with direction to take possession of the assets of the said partnership firm the same is resisted by the plaintiff and defendant no.1 on the ground that Court Receiver is in possession of the suit property though effectively they themselves were in possession and Court Receiver was only on paper.

7. Applicant bank is claiming that the said factory premises belonging to the partnership firm has been mortgaged in their favour. Bank has also claimed hypothecation of all the movables. Movable articles have been disposed of pursuant to earlier

orders passed in bank suit and an amount of Rs.3,15,000/- is lying with the Court Receiver from the sale of the said movable articles. Bank moved an application in the DRT on 5.3.03 for an order of appointment of DRT Receiver and a directions to take possession of the suit properties including factory premises which is mortgaged in favour of the bank DRT passed an order on 5.3.03 appointing private receiver in respect of the said properties. By the said order dt.5.3.03 DRT discharged Court Receiver, High Court, Mumbai in the said bank suit which was transferred to the DRT and directed Court Receiver to hand over possession of the premises to the person of the bank who was deputed by the bank to be appointed as private receiver. This order which was passed was sought to be recalled by the plaintiff and defendant no.1 on the ground that in this partnership suit Court Receiver is already in possession.

8. In the said application of recall by an order dt.23.4.03 a previous order dt.5.3.03 passed by the DRT has been placed under suspension. Matter was further considered on 25.4.03 the DRT

has kept the said order dt.5.3.03 under suspension with the direction to the plaintiff bank to make necessary application before this court. This order has been obtained by the plaintiff and defendant in the DRT on the strength of order dt.17.10.01 which was obtained by them by consent by which Court Receiver was continued on paper though infact Court Receiver was not in possession of the premises because possession of the premises was taken back by plaintiff and defendant no.1 and they were in actual use, occupation and possession. In my opinion the order of the Court Receiver in the bank suit has been nullified by plaintiff and defendant no.1 effectively by utilising this consent order dt.17.10.01 under which they continued receiver only on paper. The net consequence of entire proceeding has been that the bank claim and dues have remained outstanding and no amount whatsoever have been recovered by the bank. I am of the further opinion that even after suit which has been transferred to DRT bank tried to recover the amount. This has been effectively defeated by plaintiff and defendant no.1 by virtue of consent order obtained by them on 17.10.04. I

am of the opinion that the plaintiff and defendant no.1 are enjoying the properties under the shadow of the Court Receiver obtained by consent order. I am thus, of the opinion that the plaintiff and defendant no.1 cannot be permitted any further to utilise the order of this court to defeat legitimate dues of the bank

9. The present Notice of Motion is required to be granted. It is necessary to observe that statement of account produced by the Receiver who is present before me shows the amount of royalty received from the plaintiff no.2 and the defendant by way of royalty from 1989 till date is Rs.16,65,837/- and the amount paid by the Court Receiver to the plaintiff no.2 and defendant no.1 is Rs.17,37,784/- i.e. even before disposal of the suit even royalty amount alongwith all properties are already distributed by and between plaintiff and defendant no.1.

10. In the aforesaid circumstances, I am of the opinion that the plaintiff and defendant no.1 have been utilising the process of law in a manner so as

to defeat the claim of the bank and to prevent the bank from taking any effective steps for recovery of dues. It is clearly an abuse of process of law. The present motion is therefore, required to be made absolute in terms of prayer clause (a). Further, order dt.5.3.03 passed by DRT will be effective and appointment of Court Receiver in this case under the order dt.17.10.01 would not come in the way of DRT in appointing any private receiver but also conferring private receiver such powers as it may deem fit including power to take actual physical possession and also power to sell the said mortgaged property. Motion made absolute accordingly. No order as to costs. The learned counsel for the plaintiff and defendant no.1 applies for stay of the order. Application for stay rejected.

. Parties to act on an ordinary copy of this order duly authenticated by the Personal Assistant of this Court.